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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

P. C. SIMONS,
Attorney General of Oklahoma,
for Defendant in Error.

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Supplemental Brief for Defendant in Error.

The defendant in error contends that this court has no appellate jurisdiction to review on writ of error the final decision of the supreme court of Oklahoma in a criminal action.

An appeal being a statutory right, unless there is some express act giving this right, it does not exist.

In the organic act providing a temporary government for the Territory of Oklahoma are found the provisions creating the courts of the Territory, defining their jurisdiction, etc., and from which I extract the following:

Organic act, Oklahoma Territory, vol. 26, United States Statutes at Large, 51st Congress, 1889–1891.

Chap. 182. An act to provide a temporary government for the Territory of Oklahoma, etc.

Pages 81 to 100.

"SEC. 4. That the legislative power and authority of said Territory shall be vested in the governor and Legislative Assembly. The Legislative Assembly shall consist of a council and a house of representatives etc.

"SEC. 9. That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts and justices of the peace, etc.

"* * * and the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property, etc. * * * Writs of error, bills of exception and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court. Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, *where the value of the property or the amount in controversy*, to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars.

"SEC. 11. That the following chapters and provisions of the Compiled Laws of the State of Nebraska, in force November 1st, 1889, in so far as they are locally applicable and not in conflict with the laws of the United States or with this act are hereby extended to and put in force in the Territory of Oklahoma until after the adjournment of the first session of the Legislative Assembly of said Territory, namely * * * and of part three thereof entitled 'Criminal code.'"

Passing to the act creating the circuit court of appeals, we find the following provisions:

Vol. 26, U. S. Statutes at Large, chap. 517, pages 827 and 830, provides:

"SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: * * * 'In cases of conviction of a capital or otherwise infamous crime.'

"SEC. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases etc. * * * also in all cases arising under the patent laws, under the revenue laws, *and under the criminal laws*, etc."

Then follows provision for certifying any question up to the Supreme Court of the United States:

"SEC. 15, page 830. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgment, orders and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits."

Approved March 3, 1891.

Afterwards section 5 of the act creating the circuit court of appeals was amended as follows:

Vol. 29, U. S. Statutes at Large, chap. 68, page 492.

"That so much of section five of the act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the

United States and for other purposes,' approved March 3, 1891, as reads 'in cases of conviction of a capital or otherwise infamous crime,' be amended by striking out the words 'or otherwise infamous,' so that the same will read 'in cases of conviction of a capital crime;' and that appeals or writs of error may be taken from the district court or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital;" etc.

The general provision providing for appeals in capital cases from convictions in any court of the United States is as follows:

Vol. 25, U. S. Statutes at Large, chap. 113, pages 655 and 656
Jan. 25, 1889.

"SEC. 6. That hereafter in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs, etc."

The general provision last quoted does not apply to an appeal from the supreme court of the Territory of Oklahoma, nor the district courts of Oklahoma, for the reason that they are not "courts of the United States" as contemplated by said act. The courts meant by said act are the constitutional courts of the United States as distinguished from a legislative court.

The supreme and district courts of Oklahoma are legislative courts created by Congress under the power which it possesses to make all needful rules and regulations respecting the public territory, etc.

As decisive of this question I cite the case of—

McAllister *vs.* United States, pages 174 to 191.

I call your especial attention to that part of the opinion contained on pages 175 to 184, which contain a very full discussion of the identical question involved here, and cites many authorities.

Without attempting to quote at any length from the opinion I will extract the conclusion reached after a résumé of the matter by the court, as follows:

"These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the Territories created under the plenary municipal authority that Congress possesses over the Territories of the United States, are not courts of the United States created under the authority conferred by that article."

Summarizing the foregoing provisions, we come to the following conclusions:

1st. Appeals or writs of error may be taken from the district and circuit courts of the United States direct to the Supreme Court of the United States in capital cases.

2d. Appeals or writs of error in cases less than capital offenses shall be taken from the district and circuit courts to the circuit court of appeals and their decision shall be final.

3d. The circuit court of appeals has power to review the judgments of the supreme courts of the Territories in the same manner as of the district and circuit courts *in cases in which the judgment of the circuit court of appeals is made final. This includes criminal offenses less than capital.*

4th. The Supreme Court of the United States has power to review the judgments of the supreme court of the Territory of Oklahoma in civil cases where the amount in controversy exceeds the sum of $5,000, by virtue of the express provisions contained in the organic act.

5th. The provisions of the act of 1889 relating to appeals from courts of the United States in capital cases to the Supreme Court of the United States do not apply, because the courts of Oklahoma are not "courts of the United States" as contemplated.

6th. No statutory provision having been made whereby a capital case can be appealed from the supreme court of Oklahoma Territory to this court, and murder being an offense punishable by death or imprisonment for life at the discretion of the jury, under the laws of Oklahoma, and the plaintiff in error having been convicted of murder, this court is without jurisdiction to review the judgment of the supreme court of Oklahoma affirming the conviction.

All of which is respectfully submitted.

P. C. SIMONS,
Attorney General of Oklahoma Territory, for Defendant in Error.